

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-1057

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee.

VS.

SIDNEY R. LUBLIN,

Appellant.

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P
S

BRIEF AND APPENDIX FOR APPELLANT

GEORGE DAVID ROSENBAUM
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New York, New York 10007
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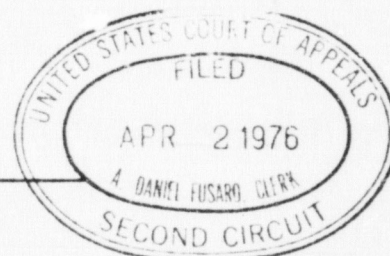


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PRELIMINARY STATEMENT

Defendant Sidney R. Lublin was indicted on a four count indictment. After trial he was acquitted as to the first three counts of the indictment and was convicted and was found guilty as to the fourth count. Said count charging that on or about March 26th, 1975 defendant unlawfully, wilfully and knowingly did steal, from the United States Post Office a package, to wit: one book entitled Sexual Suicide. In violation of Title 18, Section 1708 , United States Code. Judge William C. Conner presided over the trial and was sentenced to probation which sentence was suspended.

STATEMENT OF FACTS

The defendant was employed by the United States Post Office as a locksmith and was so employed for approximately 18 years.

On or about March 26th, 1975, he was observed in the Claims and Inquiry Section of the Post Office by internal security officers. The said Claims and Inquiry Section was in the process of being moved to another part of the building. There was a tub in the said section in which there was unclaimed articles. The defendant observed a book entitled Sexual Suicide in the tub, picked it up and was proceeding to the mens lavatory to read said book. He was stopped by the internal security agents and was questioned

what he was doing with the book and he responded he was just going to read it in the bathroom and return it. The defendant claims that the said book was in his hands and two special agents testified as follows: Agent McCarthy states that the book was in a leather bag and not in his hand and does state on page 240 that the defendant stated that he was just going to read the book. Officer Hedlund testified on direct examination that he observed the defendant take the book and walk away and did not state that the defendant put the book in a leather case. Later on in his testimony however, he testified that the book was in the case.

In addition there was testimony that the defendant had taken a pair of bolt cutters at the same time he allegedly took the book. He was not indicted for taking the pair of bolt cutters since the pair of bolt cutters appeared to be his own which he used as a locksmith on the job.

POINT I

ARGUMENT

The admission into evidence of the pair of bolt cutters which was unrelated to the issues of this case prejudiced the defendant. The Court instructed the jury that the defendant was not charged with stealing the pair of bolt cutters. However, the United States Attorney in his summation to the jury and at various instances throughout the trial refer to the defendant

taking the pair of bolt cutters which was improper and prejudiced the defendant. Indeed the jury did speculate about the defendant's criminal activity since that was the purpose that the United States attorney offered the pair of bolt cutters into evidence. Furthermore, testimony relating to the one pair of bolt cutters was totally irrelevant.

See Williams v. United States 168 U.S. 382 (1897).

In the case of United States v. DeCicco 435 F.2d 473, 483 (2d Cir. 1970), the Court held:

"Little discussion is needed to demonstrate that prior . . . acts of misconduct performed by one person cannot be used to infer guilty intent of another person who is not shown to be in any way involved in the prior misconduct, unless it be under a 'birds of a feather' theory of justice. Guilt, however, cannot be inferred merely by association. In any event, we conclude that the prejudice engendered by the admission into evidence of the prior acts of misconduct, even against . . . the doers thereof, far outweighed its legitimate probative worth, and that therefore it was an abuse of discretion for the trial court to allow its admission though the admission of the testimony was accompanied by cautionary instructions to the jury."

In the case at bar there was not even any wrong doing with reference to the one pair of bolt cutters. However, the Government did in fact by innuendo infer a wrong doing with respect to the pair of bolt cutters.

POINT II

The evidence against the defendant Lublin was insufficient to convict him on the fourth count of the indictment. In view of the fact that there was no intent to steal or take

permanently from the Government any mail. The defendant did not violate the law. There is no inconsistency in testimony either between the Government witnesses or the defendant that all he did was to take the book to read and intended to return same.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED.

Respectfully submitted,

GEORGE DAVID ROSENBAUM
Attorney for Appellant

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

DOCKET ENTRY

JUDGE CONNER

75 CRIM. 744.

D. C. Form No. 100 Rev.

TITLE OF CASE

THE UNITED STATES

VS.

SIDNEY R. LUBLIN

ATTORNEYS

For U. S.:

Allen R. Bentley, AUSA.
791-1949

filed:
12/19/75

For Defendant:

George D. Rosenbaum, Esq.
51 Chambers St. New York City

(01) STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk				
J.S. 3 mailed ✓	Marshal				
Violation	Docket fee				
Title 18					
Sec. 1708					
Mail theft.					
(Four Counts)					

75 Cr. 744

PROCEEDINGS

DATE	PROCEEDINGS
7-28-75	Filed indictment.
8-11-75	Deft. (atty. present) Pleads not guilty. Motions returnable in 10 days. Deft. R.O.R. Case assigned to Judge Conner for all purposes. Stewart, J.
8-12-75	Filed notice of appearance by George D. Rosenbaum 51 Chambers St. NYC BE3-8120
8-26-75	Filed Govt's notice of readiness for trial.
10-6-75	Deft. & atty. present... Jury trial begun..... Conner, J.
10-7-75	Trial cont'd.
10-8-75	Trial cont'd.
10-9-75	Trial cont'd. and concluded Jury verdict NOT GUILTY Cts. 1, 2 and 3. GUILTY Ct. 4. P.S.I. ordered Sent. 11-20-75 9:30 a.m. Deft's bail cont'd. R.O.R. Conner, J.

CONTINUED ON PAGE NO. 2.

DATE	PROCEEDINGS
11-20-75	Filed Judgment (Atty. George Rosenbaum, present) Imposition of sentence is suspended on Count 4. Defendant is placed on unsupervised probation for a period of THREE (3) YEARS, subject to the standing probation order of this court. CONNER, J Entered on: 11-21-75.
12-19-75	Filed Notice of Appeal from conviction of guilty entered on 10-9-75. Co mailed to Deft, Sidney Lublin, 761 North East 137th Street, North Miami Beach, Florida 33161. Copy given to U.S. Attorney.

By [Signature] Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA

- v -

SIDNEY R. LUBLIN,

Defendant.

INDICTMENT

75 Cr.

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The Grand Jury charges:

On or about the 24th day of October, 1974, in the Southern District of New York, SIDNEY R. LUBLIN, the defendant, unlawfully, wilfully and knowingly did steal, take and abstract from an authorized depository for mail matter of the United States, namely the New York General Post Office at Eighth Avenue and 33rd Street, New York, New York a certain parcel addressed to:

Wrapper's Desk
Claims & Inquiry
G.P.O., Room 4508
New York, New York 10001

(Title 18, Section 1708, United States Code.)

COUNT TWO

The Grand Jury further charges:

On or about the 26th day of March, 1975, in the Southern District of New York, SIDNEY R. LUBLIN, the defendant, unlawfully, wilfully and knowingly did steal, take, and abstract from an authorized depository for mail matter of the United States, namely, the Claims and Inquiry Section of the New York General Post Office at Eighth Avenue and 33rd Street, New York, New York, the contents of a package, to wit, a one-ounce bottle of Jou-Jou perfume.

(Title 18, Section 1708, United States Code.)

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COUNT THREE

The Grand Jury further charges:

On or about the 26th day of March, 1975, in the Southern District of New York, SIDNEY R. LUBLIN, the defendant, unlawfully, wilfully and knowingly did steal, take, and abstract from an authorized depository for mail matter of the United States, namely, the Claims and Inquiry Section of the New York General Post Office at Eighth Avenue and 33rd Street, New York, New York, the contents of a package, to wit, a white styrofoam case containing a car stereo tape deck.

(Title 18, Section 1708, United States Code.)

COUNT FOUR

The Grand Jury further charges:

On or about the 26th day of March, 1975, in the Southern District of New York, SIDNEY R. LUBLIN, the defendant, unlawfully, wilfully and knowingly did steal, take, and abstract from an authorized depository for mail matter of the United States, namely, the Claims and Inquiry Section of the New York General Post Office at Eighth Avenue and 33rd Street, New York, New York, the contents of a package, to wit, one book entitled Sexual Suicide.

(Title 18, Section 1708, United States Code.)

POPEAN

PAUL J. CUPPAN
United States Attorney

THE COURT: I know that. That doesn't mean that he was authorized to have them.

MR. ROSENBAUM: He may have not have been authorized to have a multitude of things but it is not before the Court. Only what is in the indictment is before this Court. It is highly prejudicial to this defendant and it is outside the scope of the indictment.

THE COURT: It seems to me it is prejudicial and I wonder whether it is really necessary. I can give the jury an instruction that they shouldn't form any conclusion from the failure to put the bolt cutter and the badge in evidence.

MR. BENTLEY: It is a similar act as well as being part of the very basic core in this case. Under the case law, if we offered to prove that let's say halfway between these two incidents Lublin had stolen or taken this bolt cutter, we would be entitled to do so.

THE COURT: On what basis?

MR. BENTLEY: To prove his intent and to negative any defense he may raise of innocent taking. It shows a pattern. I think it's a fortiori where the item is taken on the same day and almost seconds after the other items had been taken.

THE COURT: The Second Circuit does follow the

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2 inclusionary rule. If there is any reason for admitting
3 the evidence other than to prove criminal tendency, it is
4 admissible. The reason in this case is not quite clear to
5 me.

6 MR. BENTLEY: The mere fact that he was not indicted
7 for this does not mean we can't offer proof of what he did.

8 THE COURT: I realize that, providing there is
9 some reason to do it.

10 MR. BENTLEY: I believe the defendant is going to
11 claim that he bought the perfume or bought the tape deck,
12 that he was borrowing the book to read in the bathroom and
13 certainly the question of whether he had a bolt cutter cuts
14 against that claim and the badge. We don't know what his
15 claim will be with regard to the badge but this is certainly
16 something the jury is entitled to consider when they look at
17 what the defendant did on this particular day.

18 MR. ROSENBAUM: If the government, if that's
19 their position, then let them make this offer in rebuttal.
20 I will thereafter make my objection. On the direct case
21 it is highly prejudicial to speculate as to what the defen-
22 dant will say as far as the defendant is concerned and put
23 in lock stock and barrel. This has nothing to do with the
24 case.

25 MR. BENTLEY: He already testified to this without

objection.

MR. ROSENBAUM: What?

MR. BENTLEY: To the taking of the bolt cutter and the badge. He did make a statement --

THE COURT: I think perhaps the jury might conclude that if there is not evidence about the finding of the badge and the bolt cutter on him that there was something wrong with the testimony that he took those items, and since that testimony that he took the items was admitted without objection I think you have a point. I think it also tends to show intent. I will permit it. I will overrule the objection.

MR. ROSENBAUM: I respectfully except.

(In open court)

BY MR. BENTLEY:

Q Are there any other initials that were placed on that tag on March 26th?

A Yes, there are.

Q Whose are they?

A Mr. Lublin's, Inspector Cassidy's, Jack Hedlund's and Joe Molina's.

Q Inspector Cassidy and Mr. Molina, who are they?

A Inspector Cassidy is the man that advised Mr. Lublin of his constitutional rights in the office. Mr. Molina is another special investigator who was present with

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A Other than the bolt cutter, no.

MR. ROSENBAUM: I have no further questions.

THE COURT: It may be received.

(Government's Exhibit 7 received in evidence.)

BY MR. BENTLEY:

Q Where was the book at the time you met Mr. Lublin in the hallway in the space you have indicated as Y on the diagram?

A The book was in the leather bag that he had in his hand, where he had placed it while in inquiry.

Q What, if anything, did you do after receiving the book and the bolt cutter?

A Took Mr. Lublin up to his locker on the fifth floor. We went to the locker. He showed us which locker was his. He opened the door up and removed his jacket and in the right-hand pocket of the jacket was the bottle of perfume he had placed there earlier. On the shelf of the locker was the badge he had taken earlier.

Q I show you Government's Exhibit 2 for identification and ask you if you can identify that article.

A Yes, I can.

Q What is it?

A This is the bottle of perfume that was removed from Mr. Lublin's jacket pocket where he had placed it

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Q After he picked it up?

A After he picked it up he placed it under his jacket.

Q Did there come a time when you saw Mr. Lublin again that morning?

A Yes, shortly thereafter he came back into the Claims and Inquiry work section again.

Q And where were you at the time that he came back again?

A I was in the same position I was when I first saw him, in that gallery.

Q What did he do on returning to the Claims and Inquiry Section?

A He came in and walked around the work floor again and he proceeded to go to a tub out of which he removed a book.

Q Is there any indication on the diagram as to where that tub was?

A That tub would be located in the diagram at area 4.

Q What did he do after taking the book out of the tub?

A He just walked across the claims and inquiry work floor and when he came to a wall there was a pair of bolt cutters that he picked up, and after he picked these up he walked out of the Claims and Inquiry Section and left.

that work floor and went into a public corridor.

Q Showing you Government's Exhibit 4 in evidence, does that appear to be the book?

A Yes, it is.

Q Referring to Government's Exhibit 6 in evidence, do those appear to be the bolt cutters?

A They are the bolt cutters.

Q What, if anything, did you do after Lublin left the work floor area?

A We left our position in the gallery and came down through a staircase and approached him in that public corridor.

MR. ROSENBAUM: Which public corridor, if your Honor please?

THE WITNESS: Well --

THE COURT: Which public corridor are you speaking of?

THE WITNESS: That public corridor is the same area where number 1 is, where the man in the orange hat removed the best parcel marked number 1.

THE COURT: That is the corridor that extended horizontally near the bottom of Exhibit 9-A, is that right?

THE WITNESS: The door number's on there, your Honor, on this diagram, it says 4518 right adjacent to the

Q And where was this book?

A It was on the floor

Q In what area?

A There is rubbish over there. They were in the process of moving and this was on the floor.

MR. BENTLEY: Objection. It is not responsive to the question.

THE COURT: I think ultimately it will be responsive. I will withhold ruling until I hear a complete answer.

Q Where was this part of the rubbish located?

A Right near the door I was working.

Q What did you do, pick up the book?

A Yes.

Q What did you do with the book?

A I held it in my arm and I went through the leaves.

Q You went through the leaves of the book?

A I went through it, right.

Q Did there come a time you left?

A Yes, I did.

Q Did you leave carrying this bag?

A I did carry this bag, right.

Q And the bolt cutter?

A Right.

Q Where was the book?

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A In my right arm, this was in my left arm and this
on my shoulder.

Q This was on your shoulder?

A Yes.

Q What were you going to do with reference to the
book?

A I was going to the bathroom and just look at it.

Q And did you intend to return it?

A Yes, I did.

Q And you were stopped somewhere in the vicinity
of elevators 111 and 112 by McCarthy and Hedlund, is that
correct?

A Yes, sir.

Q And did you tell them about the book?

A I did.

Q Did you tell them you intended to go to the bath-
room?

A And read it.

Q And you were going to return it?

A Yes.

Q And they placed you under arrest, is that right?

A Exactly, right.

Q Did you explain to them what you were doing with
that bolt cutter?

Q When they first approached you in that hallway and when they -- did they not -- where did you go after they approached you outside the claims and inquiry?

A I was going back to my unit.

Q Where did you go with Mr. McCarthy and Mr. Hedlund?

A They took me to the office.

Q Did they talk to you?

A Yes.

Q And did you talk about the book and the bolt cutter?

A He asked me about the book and I said I was going to read it.

Q You talked about these articles, is that right?

MR. ROSENBAUM: I wish the witness to have an opportunity to answer. The question, "Did you talk about the book and bolt cutter?" He did not have an opportunity to respond.

THE COURT: Do you want to answer that question, Mr. Lublin?

THE WITNESS: Yes.

THE COURT: You may answer.

A I had the book in my right hand, the bolt cutter in my left hand and McCarthy or Hedlund, I don't recall --

THE COURT: The question is: did you talk about it?

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THE WITNESS: They asked me about the book. I said I was going to read it in the bathroom. I was going to the bathroom at that end.

Q And then you went up to your work area?

A I didn't, no. They took me into their office.

Q They took you into the office, but where did you go, if anywhere, after you left the office, from the office?

A They took me to my unit.

Q And they went to this filing cabinet, is that right?

A Mr. Hedlund -- just Mr. McCarthy went with me.

Q Mr. McCarthy took you to the filing cabinet?

A He took me to my unit.

Q And in your unit do you have a locker?

A Yes, I do.

Q And the perfume was -- they told you it was taken from your jacket in your locker?

A The jacket wasn't in the locker. The jacket was hanging.

Q Near the locker?

A Yes, near the locker.

Q And after these articles had been found, did you have some further conversation with McCarthy and Hedlund?

A No, sir.

In

2 to believe this man was coming back. They saw Mr. Laning
3 talk to him, they saw him come on to the work floor and
4 look at the lock and walk away and they also knew by that
5 time that he was a locksmith because they knew the man with
6 the orange hat, they had seen that in the locksmith shop.

7 Why didn't he ask him about the perfume and the
8 styrofoam box the first time they brought him into their
9 office? This is something -- they are law enforcement
10 personnel, they have their procedures, they have their way
11 of handling things. I think you can see a pattern here,
12 ladies and gentlemen. They asked him about the book when
13 they had the book. They asked him about the bolt cutter
14 when they had the bolt cutter, then they asked him if he
15 had any other storage areas because they wanted to find the
16 perfume and the tape deck before they asked him about it
17 and that's exactly what they did.

18 Mr. Hedlund may have asked Mr. Lublin about the
19 book out in the hallway. That doesn't mean that Mr. Lublin
20 was carrying the book outside. Mr. Hedlund had seen him
21 put the book in this leather case. Wouldn't it be reason-
22 able for Mr. Hedlund to go up to him and say, "Where are you
23 going with the book in your black leather case?"

24 He didn't need to say it after he had just seen
25 the man put it in the case.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUITUNITED STATES OF AMERICA,
Appellee,

- against -

SIDNEY R. LUBLIN,
Appellant.,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

NEW YORK


ss.:

I, Reuben A. Shearer *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
211 West 144th Street, New York, New York 10030
That on the 2nd day of April 1976 at One St. Andrews Plaza, New York, New York
deponent served the annexed Appendix Brief upon

Robert B. Fiske Jr.
the Attorney in this action by delivering ² true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein.

Sworn to before me, this 2nd
day of April 19 76

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977


Reuben Shearer